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**IN THE
COURT OF APPEALS OF INDIANA**

KENNETH SIMPSON,
Appellant-Defendant,

VS.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 75A03-0508-PC-397

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Marvin D. McLaughlin, Senior Judge
Cause No. 75C01-8902-CF-30

June 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Kenneth Simpson (“Simpson”) appeals the denial of his petition for post-conviction relief, which challenged his conviction for Murder, a felony.¹ We affirm.

Issue

Simpson presents five issues for review. We address the issue that is not waived, res judicata, or procedurally defaulted: whether he was denied the effective assistance of trial and appellate counsel.²

Facts and Procedural History

On July 27, 1990, Simpson was convicted of Murder. On August 17, 1990, he was sentenced to fifty years imprisonment. Simpson appealed, and on July 9, 1992, this Court issued an Opinion affirming his conviction.

On November 24, 1998, Simpson filed a Petition for Post-Conviction Relief, which was subsequently withdrawn without prejudice. On October 12, 2004, Simpson filed an Amended Petition for Post-Conviction Relief. The Amended Petition alleged that the trial court improperly denied Simpson expert witness funds, that the prosecutor committed misconduct and that Simpson was denied the effective assistance of counsel. On May 4, 2005, the petition was denied. Simpson filed a Motion for Post-Judgment Relief, which was also denied. On June 9, 2005, Simpson filed his Notice of Appeal.

On May 19, 2006, the State filed a Motion for Remand. This Court granted the

¹ Ind. Code § 35-42-1-1.

motion on May 30, 2006, and remanded the cause to the post-conviction court for an evidentiary hearing and an order including findings of fact and conclusions of law. On July 28, 2006, the post-conviction court issued its findings of fact, conclusions of law, and order denying Simpson post-conviction relief. On September 26, 2006, this Court resumed its exercise of jurisdiction over the case.

Discussion and Decision

Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief faces a rigorous standard of review. Benefiel v. State, 716 N.E.2d 906, 911-12 (Ind. 1999). To prevail on appeal, the petitioner must demonstrate that the evidence as a whole “leads unerringly and unmistakably to a decision opposite that reached by the trial court.” Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001). Stated differently, we will disturb a post-conviction court’s decision only where the evidence is uncontradicted and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998). Upon reviewing a petition for post-conviction relief, we may consider only the evidence and the reasonable inferences supporting the judgment of the post-conviction court, i.e., the sole judge of the evidence and the credibility of the witnesses. Blunt-Keene v. State, 708 N.E.2d 17, 19 (Ind. Ct. App. 1999).

Simpson claims he was denied the effective assistance of both trial and appellate

² We do not address Simpson’s freestanding claims of sentencing error, prosecutorial misconduct or judicial misconduct. When an issue is available at the time of direct appeal, but is not raised, it is precluded from

counsel. Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” Id.

Moreover, under the Strickland test, counsel’s performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

Appellate ineffectiveness claims are evaluated under the standard of Strickland, 466 U.S. at 668. Appellate courts should be particularly deferential to an appellate counsel’s

review in a subsequent post-conviction proceeding. Taylor v. State, 840 N.E.2d 324, 330-31 (Ind. 2006).

strategic decision to include or exclude issues, unless the decision was “unquestionably unreasonable.” Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997). To prevail on his claim of ineffective assistance of appellate counsel, Simpson must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002).

Simpson complains that his trial counsel’s performance was deficient in five areas: (1) failure to adequately investigate hair evidence; (2) failure to interview and call alibi witnesses; (3) failure to meet with Simpson to discuss pertinent issues; (4) failure to secure a continuance when the death of Simpson’s step-father was imminent; and (5) failure to present a defense. Simpson further claims that his appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel.

Simpson presented no testimonial evidence to the post-conviction court. From the record, we cannot discern the identity of Simpson’s desired alibi witnesses or what testimony they would allegedly have provided. Nor are we able to discern the substance of any other defense strategy allegedly available, but ignored by trial counsel. Bald assertions of counsel’s omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See Tapia v. State, 753 N.E.2d 581, 587 (Ind. 2001).

Moreover, because Simpson has not demonstrated ineffectiveness of trial counsel, appellate counsel was not ineffective for failing to allege trial counsel’s ineffectiveness.

Affirmed.

SHARPNACK, J., and MAY, J., concur.